

1 EDMUND G. BROWN JR.  
Attorney General of the State of California  
2 DANE R. GILLETTE  
Chief Assistant Attorney General  
3 GERALD A. ENGLER  
Senior Assistant Attorney General  
4 GREGORY A. OTT  
Deputy Attorney General  
5 PEGGY S. RUFFRA  
Supervising Deputy Attorney General  
6 State Bar No. 117315  
455 Golden Gate Avenue, Suite 11000  
7 San Francisco, CA 94102-3664  
Telephone: (415) 703-1362  
8 Fax: (415) 703-1234  
Email: peggy.ruffra@doj.ca.gov  
9 Attorneys for Respondent

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
12 SAN FRANCISCO DIVISION

13 **ALEJANDRO MICHEL,**

14 Petitioner,

15 v.

16 **J. WALKER, Warden,**

17 Respondent.  
18

C 08-1724 JSW

**MOTION TO DISMISS HABEAS  
CORPUS PETITION AS  
UNTIMELY**

19 Respondent hereby moves to dismiss the petition for writ of habeas corpus for failure to  
20 comply with the statute of limitations set forth at 28 U.S.C. § 2244(d).

21 A motion to dismiss in lieu of an answer on the merits is proper where the petition is  
22 procedurally defective. *See White v. Lewis*, 874 F.2d 599, 602-603 (9th Cir. 1989); *O'Bremski v.*  
23 *Maass*, 915 F.2d 418, 420 (9th Cir. 1990); Rules Governing 28 U.S.C. § 2254 Cases, Rule 4 and  
24 Advisory Committee Notes. We have not noticed a hearing date because petitioner is an  
25 incarcerated state prisoner who is representing himself in this case.  
26

27 **STATEMENT OF THE CASE**

28 On January 6, 2003, petitioner pled guilty in Marin County Superior Court to six counts

1 of robbery and two counts of attempted robbery, and admitted that he was armed with a firearm.  
 2 Petition at 2, ¶ 3a. On March 20, 2003, the court corrected the sentence to be 12 years and four  
 3 months in prison. Petition at 2, ¶ 3f-g.

4 On April 28, 2004, the California Court of Appeal affirmed the judgment and sentence.  
 5 Exh. 1. On July 28, 2004, the California Supreme Court denied review. Exh. 2.

6 On April 4, 2007, petitioner filed a habeas corpus petition in Marin County Superior  
 7 Court, which was denied on April 25, 2007. Exh. 5, Exh. A. On June 27, 2007, petitioner filed a  
 8 habeas corpus petition in the California Court of Appeal, which was denied on July 13, 2007. Exh.  
 9 3. On August 11, 2007, petitioner filed a habeas corpus petition in the California Supreme Court,  
 10 which was denied on January 30, 2008. Exhs. 4, 5.

11 On March 31, 2008, petitioner filed a habeas corpus petition in this Court.

## 12 13 **ARGUMENT**

### 14 **THE PETITION IS UNTIMELY**

15 This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996  
 16 (AEDPA), which imposed a one-year statute of limitations on the filing of federal habeas petitions.  
 17 28 U.S.C. § 2244(d). The purpose of the statute is to “encourag[e] prompt filings in federal court  
 18 in order to protect the federal system from being forced to hear stale claims.” *Carey v. Saffold*, 536  
 19 U.S. 214, 226 (2002).

20 The limitations period commences on “the date on which the judgment became final by  
 21 the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C.  
 22 § 2244(d)(1)(A). Direct review includes the 90-day period in which to file a petition for writ of  
 23 certiorari in the Supreme Court. *See Bowen v. Roe*, 188 F.3d 1157 (9th Cir. 1999). Petitioner’s state  
 24 judgment became final on July 26, 2004, 90 days after the California Supreme Court denied review.  
 25 Accordingly, petitioner had until July 26, 2005, to file a timely federal petition. *See Patterson v.*  
 26 *Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001). Absent tolling, his federal petition filed on March  
 27 31, 2008, is late by almost three years.

28 The limitations period is tolled during the pendency of a properly filed state collateral

1 challenge to the judgment. 28 U.S.C. § 2244(d)(2). However, a state habeas corpus petition filed  
2 after the statute has expired does not toll the limitations period. *Ferguson v. Palmateer*, 321 F.3d  
3 820, 823 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period  
4 that has ended before the state petition was filed”). Here, petitioner did not begin his state collateral  
5 challenges until April 2007, almost two years after the limitations period had expired. Thus, none  
6 of his state habeas corpus petitions tolled the statute.

7         We note that petitioner filed with his petition a document entitled Motion to File Habeas  
8 Corpus and Reason for Delay, in which he argues that the two-month delay between the denial of  
9 his last state habeas petition on January 30, 2008, and the filing date of his federal petition on March  
10 31, 2008, should be excused because he did not receive the denial order until March 7, 2008, as the  
11 result of an address change. However, even accounting for that two-month period, the federal  
12 petition is still untimely by several years.

13         For the above reasons, the petition must be dismissed as untimely.

**CONCLUSION**

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be dismissed with prejudice for failure to comply with the statute of limitations in 28 U.S.C. § 2244(d).

Dated: June 12, 2008

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of the State of California

DANE R. GILLETTE  
Chief Assistant Attorney General

GERALD A. ENGLER  
Senior Assistant Attorney General

GREGORY A. OTT  
Deputy Attorney General

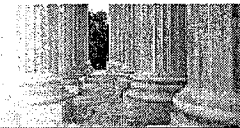
**/s/ Peggy S. Ruffra**

PEGGY S. RUFFRA  
Supervising Deputy Attorney General  
Attorneys for Respondent

# **EXHIBIT 1**

# CALIFORNIA APPELLATE COURTS

Case Information



Welcome

**1st Appellate District**

Change court

Search

Court data last updated: 06/10/2008 12:05 PM

E-mail

Case Summary Docket Scheduled Actions Briefs  
Disposition Parties and Attorneys Trial Court

Calendar

Help

## Docket (Register of Actions)

Opinions

**The People v. Michel**

**Division 5**

**Case Number A102127**



Date	Description	Notes
04/02/2003	Notice of appeal lodged/received (criminal).	
04/18/2003	Notice of record completion received.	
04/18/2003	Record on appeal filed.	c-1-r-1
04/18/2003	Probation report filed.	(1)
06/03/2003	Telephone conversation with:	FDAP sent the cao on 05-15-03/will resend.
06/05/2003	Telephone conversation with:	fdap/cao is on its way.
06/06/2003	Counsel appointment order filed.	Eleanor Kraft appt'd counsel for appt, Michel/indep/40 days.
07/08/2003	32.1(b) letter received from:	Ms. Kraft/requests the preliminary hearing tx.
07/17/2003	Default sent to court appointed counsel.	
08/01/2003	Telephone conversation with:	superior court for eta of tx.
08/06/2003	Telephone conversation with:	called marin superior court again for status as there was no response to my 08-01-03 call/21 days of hearing for one motion/she will try to get it done by Monday.
08/12/2003	Requested - extension of time.	Attorney: Kraft, Eleanor Party: Michel, Alejandro Attorney: First District Appellate Project Party: Michel, Alejandro
08/13/2003	Granted - extension of time.	Attorney: Kraft, Eleanor Party: Michel, Alejandro Attorney: First District Appellate Project Party: Michel, Alejandro
08/15/2003	Filed augmented record pursuant to rule 32.1(b)	preliminary hearing tx.

09/11/2003	Appellant's opening brief.	Attorney: Kraft, Eleanor Party: Michel, Alejandro
10/15/2003	Respondent notified pursuant to rule 17(a)(2) or 37(b).	
11/17/2003	Requested - extension of time.	Attorney: Office of Attorney General Party: The People
11/17/2003	Granted - extension of time.	Attorney: Tung, Nancy Party: The People
12/10/2003	Respondent's brief.	Attorney: Office of Attorney General Party: The People
12/16/2003	Appellant's reply brief.	Attorney: Kraft, Eleanor Party: Michel, Alejandro
12/16/2003	Case fully briefed.	
01/07/2004	Oral argument waiver notice sent.	
01/16/2004	Record to court for review.	
01/21/2004	Argument waived by: (no response - 10 day notice)	
04/28/2004	Submission order filed.	
04/28/2004	Opinion filed.	
05/28/2004	Petition for review in Supreme Court received.	
06/02/2004	Record transmitted to Supreme Court.	
07/28/2004	Petition for review filed in Supreme Court.	S125202
07/28/2004	Remittitur issued.	
07/28/2004	Case complete.	
08/09/2004	Record returned from Supreme Court.	
04/27/2006	Shipped to state retention center, box # / list #:	L222

**[Click here](#) to request automatic e-mail notifications about this case.**

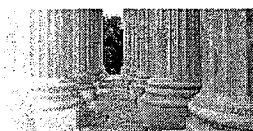
©2007 Judicial Council of California

## **EXHIBIT 2**



# CALIFORNIA APPELLATE COURTS

Case Information



Supreme  
Court

**Supreme Court**

Change court

Welcome

Court data last updated: 06/10/2008 12:53 PM

Search

[Case Summary](#) [Docket](#) [Briefs](#)  
[Disposition](#) [Parties and Attorneys](#) [Lower Court](#)

E-mail

## Docket (Register of Actions)

Calendar

PEOPLE v. MICHEL

Help

Case Number **S125202**

Opinions



Date	Description	Notes
06/01/2004	Petition for review filed	By counsel for appellant {Alejandro Michel}.
06/01/2004	Record requested	
06/02/2004	Received Court of Appeal record	file jacket/accordion file
07/28/2004	Petition for review denied	

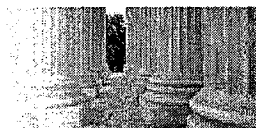

[Click here to request automatic e-mail notifications about this case.](#)

© 2007 Judicial Council of California

## **EXHIBIT 3**

# CALIFORNIA APPELLATE COURTS

## Case Information

[Welcome](#)**1st Appellate District**[Change court](#) [Search](#)

Court data last updated: 06/04/2008 02:05 PM

[E-mail](#)[Case Summary](#) [Docket](#) [Scheduled Actions](#) [Briefs](#)  
[Disposition](#) [Parties and Attorneys](#) [Trial Court](#)[Calendar](#)[Help](#)[Opinions](#)

## Docket (Register of Actions)

**In re Michel on Habeas Corpus.****Division 5****Case Number A118214**

Date	Description	Notes
06/27/2007	Petition for a writ of habeas corpus filed.	
07/13/2007	Order denying petition filed.	The petition for writ of habeas corpus is denied.
07/13/2007	Case complete.	
03/18/2008	Shipped to state retention center, box # / list #:	L274

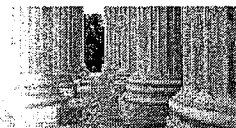
[Click here](#) to request automatic e-mail notifications about this case.

©2007 Judicial Council of California

## **EXHIBIT 4**

# CALIFORNIA APPELLATE COURTS

Case Information



Supreme Court

## Supreme Court

Change court ☒

Court data last updated: 06/04/2008 01:53 PM

Welcome

Search

Case Summary Docket Briefs  
Disposition Parties and Attorneys Lower Court

E-mail

## Docket (Register of Actions)

Calendar

MICHEL (ALEJANDRO F.) ON H.C.

Help

Case Number S155473

Opinions

Date	Description	Notes
08/17/2007	Petition for writ of habeas corpus filed	Alejandro F. Michel, petitioner in pro per (Exhibits attached to petition)
01/30/2008	Petition for writ of habeas corpus denied	George, C.J., was absent and did not participate.



[Click here](#) to request automatic e-mail notifications about this case.

©2007 Judicial Council of California

## **EXHIBIT 5**

Name Alejandro F. MichelAddress C.C.I. / P.O. Box 1906 (4B-8A-204)  
TEHACHAPI, CA 93581CDC or ID Number T-86169SUPREME COURT OF CALIFORNIA

(Court)

## PETITION FOR WRIT OF HABEAS CORPUS

Alejandro F. Michel  
Petitioner

vs.

No. \_\_\_\_\_  
(To be supplied by the Clerk of the Court)WILLIAM J. SULLIVAN, WARDEN  
Respondent

## INSTRUCTIONS — READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court [as amended effective January 1, 1999]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Page one of six

This petition concerns:

- ☐ A conviction
 ☐ Parole  
☒ A sentence
 ☐ Credits  
☐ Jail or prison conditions
 ☐ Prison discipline  
☐ Other (specify): \_\_\_\_\_

1. Your name: Alejandro E. Michel  
 2. Where are you incarcerated? "CALIFORNIA CORRECTIONAL INSTITUTION", Tehachapi, Calif.  
 3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

SIX counts of 2nd-Degree Robbery and 2 counts of Attempted Robbery with use of a FIREARM IN CONNECTION with one count of 2nd Deg. Robbery.

- b. Penal or other code sections: P.C. § 211, 664 and 12022

- c. Name and location of sentencing or committing court: MARIN COUNTY Superior Court;

SAN RAFAEL, CALIFORNIA

- d. Case number: 123016

- e. Date convicted or committed: JANUARY 6, 2003

- f. Date sentenced: MARCH 20, 2003

- g. Length of sentence: 12 years, 4 months

- h. When do you expect to be released? October 30, 2013

- i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:

CARL GONSER; PUBLIC DEFENDER'S OFFICE; 3501 CIVIC CENTER DRIVE;  
SAN RAFAEL, CA - 94903

4. What was the LAST plea you entered? (check one)

☐ Not guilty
 ☒ Guilty
 ☐ Nolo Contendere
 ☐ Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

☐ Jury
 ☐ Judge without a jury
 ☐ Submitted on transcript
 ☐ Awaiting trial



## 6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

\* Due to scope of issues please see Attached Memorandum of points and authorities in support of petition for writ of habeas corpus hereto.

## a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

(Same as above)

## b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

\* Please see Attached memorandum of points and authorities hereto.

7. Ground 2 or Ground \_\_\_\_\_ (if applicable):

*\* Due to scope of issue please see Attached Memorandum of Points and Authorities in support of petition for writ of Habeas Corpus hereto.*

a. Supporting facts:

*(Same as above)*

b. Supporting cases, rules, or other authority:

*\* Please see Attached Memorandum of Points and Authorities hereto.*

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes. ☐ No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

CALIFORNIA COURT OF APPEAL; FIRST APPELLATE DISTRICT

b. Result: JUDGMENT AFFIRMED

c. Date of decision: 4/28/04

d. Case number or citation of opinion, if known: NO. A102127

e. Issues raised: (1) THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT RETURNED HIM TO COURT AND RESENTENCED HIM.

(2) \_\_\_\_\_

(3) \_\_\_\_\_

f. Were you represented by counsel on appeal? ☒ Yes. ☐ No. If yes, state the attorney's name and address, if known:

CLEANOR M. KRAET; P.O. BOX 60698; PAILO AITO, CA. 94306

9. Did you seek review in the California Supreme Court? ☒ Yes. ☐ No. If yes, give the following information:

a. Result: DENIED REVIEW

b. Date of decision: 7/28/04

c. Case number or citation of opinion, if known: NO. A102127

d. Issues raised: (1) (SAME AS ABOVE)

(2) \_\_\_\_\_

(3) \_\_\_\_\_

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

AT TIME OF PETITIONER'S DIRECT APPEAL, BIAKELY WAS PENDING IN THE U.S. SUPREME

COURT; WHEREFORE, THE CLAIM HEREIN IS APPLIED RETROACTIVELY (SEE U.S. V. OLANO, 507 U.S. 725, AT 733 (1993)); AND IN RE BIRDWELL, 50 CAL. APP. 4TH 926, AT 927.

11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

N/A

b. Did you seek the highest level of administrative review available? ☐ Yes. ☐ No.

Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: MARIN COUNTY SUPERIOR COURT
- (2) Nature of proceeding (for example, "habeas corpus petition"): habeas corpus petition
- (3) Issues raised: (a) APPRENDI-BIAKEY-CUNNINGHAM VIOLATION
- (b) \_\_\_\_\_
- (4) Result (Attach order or explain why unavailable): DENIED (ORDER ATTACHED HERETO AS EXH. C')
- (5) Date of decision: APRIL 25, 2007
- b. (1) Name of court: CALIFORNIA COURT OF APPEAL; FIRST APPELLATE DISTRICT, DIV. 5
- (2) Nature of proceeding: HABEAS CORPUS PETITION
- (3) Issues raised: (a) (SAME AS HEREIN) (& SAME AS SUPERIOR COURT ABOVE)
- (b) \_\_\_\_\_
- (4) Result (Attach order or explain why unavailable): DENIED (SEE ATTACHED EXH. B' HERETO)
- (5) Date of decision: JULY 13, 2007

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:
- \_\_\_\_\_
- \_\_\_\_\_

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

"THE GENERAL RULE THAT AN UNEXPLAINED DELAY IN SEEKING RELIEF MAY BAR HABEAS CORPUS RELIEF DOES NOT APPLY TO THE CORRECTION OF AN UNAUTHORIZED SENTENCE" (IN RE BIRDWELL (1996) 50 CAL-APP-4TH 926, AT 927) (SEE ALSO, PEOPLE V. TENDRIO (1970) 30 CAL-2D 89 AT 95 FN.2)

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:
- \_\_\_\_\_

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:
- \_\_\_\_\_

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

APPLICATION TO THIS COURT IS APPROPRIATE (SEE IN RE HUDDINOTT (1996) 12 CAL-4TH 992 AT 995 FN.2).

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 7-29-07

  
(SIGNATURE OF PETITIONER)

MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

I.

THE TRIAL COURT'S IMPOSITION OF THE UPPER TERM OF IMPRISONMENT IN ALL SIX COUNTS OF 2ND DEGREE ROBBERY AND IN BOTH COUNTS OF ATTEMPTED ROBBERY, BASED ON FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT, AND ADMITTED BY PETITIONER TO BE TRUE, VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION UNDER APPENDI V. NEW JERSEY, 530 U.S. 466 (2000); BLARELY V. WASHINGTON, 542 U.S. 296 (2004); CUNNINGHAM V. CALIFORNIA, AND PEOPLE V. BANKS, (APR. 13, 2007) 6036873, CAL. APP. 4TH, \_\_\_\_\_ (2007 WL 111849).

STATEMENT OF FACTS

ON JANUARY 6, 2003 AN INFORMATION WAS FILED IN THE MARIN COUNTY SUPERIOR COURT CHARGING PETITIONER WITH SIX COUNTS OF 2ND DEGREE ROBBERY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 211 (COUNTS 4-9) AND TWO COUNTS OF ATTEMPTED ROBBERY IN VIOLATION OF P.C. §§ 211 & 664 (CLERK'S TRANSCRIPTS<sup>2</sup> AT PAGES 144-147).

THE INFORMATION FURTHER ALLEGED THAT PETITIONER WAS ARMED WITH A FIREARM IN COUNT 6, IN VIOLATION OF P.C. § 12022(a)(1) (CT. 145).

ON JANUARY 6, 2003 PETITIONER

---

HEADNOTE: 1. HEREIN AFTER: P.C. §.  
 2. HEREIN AFTER: CT.

1 PLEAD GUILTY TO ALL SIX COUNTS OF 2ND. DEGREE ROBBERY AND BOTH  
 2 COUNTS OF A TEMPTED ROBBERY (CT. 134). PETITIONER ALSO ADMITTED  
 3 THE SPECIAL ALLEGATION TO BE TRUE (CT. 134).

4 ON MARCH 19, 2003 THE COURT SENTENCED  
 5 PETITIONER TO THE UPPER TERM OF 5-YEARS ON COUNT SIX AND  
 6 CONSECUTIVE ONE-YEAR TERMS ON EACH OF THE REMAINING FIVE  
 7 2ND. DEGREE ROBBERY COUNTS-, INCLUDING SIX-MONTHS ON EACH OF  
 8 THE ATTEMPTED ROBBERY COUNTS / CHARGES (COUNTS 10 & 11).<sup>3.</sup>

9 FINALLY, THE COURT IMPOSED A 1-YEAR  
 10 TERM FOR THE REMAINING ENHANCEMENT, FOR A TOTAL OF 12-YEARS<sup>3.</sup>  
 11 ON THE FOLLOWING DAY, MARCH 20, 2003, THE COURT CORRECTED THE  
 12 SENTENCE ON COUNTS 10 & 11 TO 8-MONTHS IN EACH COUNT, FOR A  
 13 NEW TOTAL SENTENCE OF 12-YEARS, 4-MONTHS<sup>4.</sup>

#### 14 15 16 ARGUMENT

17 PETITIONER ACKNOWLEDGED, IN GUILTY PLEA,  
 18 THAT HE WAS SUBJECT TO A MAXIMUM PRISON TERM OF 12-YEARS, 4-  
 19 MONTHS<sup>5.</sup> HOWEVER, THE COURT SHOULD NOT HAVE IMPOSED THE MAXIMUM  
 20 SENTENCE. BASED ON THE COUNTS OF CONVICTIONS, THE COURT SHOULD  
 21 HAVE SENTENCED PETITIONER TO A LESSER TERM. INSTEAD THE  
 22 JUDGE FOUND THAT THE "FACTS WARRANTED IMPOSITION OF AGGRAVATED  
 23 TERMS". AND THUS IMPOSED THE UPPER TERM.<sup>6.</sup>

24 THE "FACTS" FOUND BY THE JUDGE WERE NEITHER  
 25

---

26 3. CT. 160-161;

27 4. CT. 163;

5. CT. 134;

6. CT. 160-163.

1 ADMITTED BY PETITIONER NOR FOUND BY THE JURY. HENCE, SINCE  
 2 THE ESSENTIAL FACTS INCREASE THE SENTENCE BY TWO-YEARS, FOUR-  
 3 MONTHS, THE PENALTY IMPOSED VIOLATES PETITIONER'S CONSTITUTION-  
 4 -AL FEDERAL RIGHTS.

5 UNDER THE REQUIREMENTS OF THE SIXTH AND FOUR-  
 6 -TEENTH AMENDMENTS AS OUTLINED IN BLAKELY V. WASHINGTON,  
 7 542 U.S. 296 (2004), AND AS RECENTLY REITERATED BY THE U.S.  
 8 SUPREME COURT IN CUNNINGHAM V. CALIFORNIA (2007) 549 U.S.  
 9 [127 S. CT. 856]. THE JUDGE COULD IMPOSE NO MORE THAN 10-YEARS,  
 10 4-MONTHS (I.E., MIDTERM SENTENCE).

11 THE JUDGE IN THIS CASE STATED AT SENTENCING  
 12 THAT SHE WAS RELYING ON THE AGGRAVATING FACTORS WHICH WERE  
 13 CONTAINED IN THE PROBATION REPORT (CT. 161-163).

14 THESE FACTORS CONSIST OF ISSUES SUCH AS:

- 15 (1.) PETITIONER'S PRIOR ADJUDICAT-
- 16 -IONS OF COMMISSION OF CRIMES AS A JUVENILE;
- 17 (2.) PETITIONER'S PRIOR PERFORM-
- 18 -ANCE ON PROBATION WAS UNSATISFACTORY;
- 19 (3.) A VICTIM WAS HURT DURING
- 20 ONE ROBBERY / PETITIONER ENGAGED IN A PATTERN OF VIOLENT
- 21 CONDUCT WHICH INDICATES A SERIOUS DANGER TO SOCIETY; AND
- 22 (4.) PETITIONER'S CRIMES ARE OF
- 23 INCREASING SERIOUSNESS AND HE IS A MEMBER OF A CRIMINAL
- 24 STREET GANG.

25 PETITIONER SUBMITS THAT APPENDIX-BLAKELY-  
 26 CUNNINGHAM (SUPRA) RENDERS UNCONSTITUTIONAL PORTIONS OF  
 27 CALIFORNIA'S DETERMINATE SENTENCING SCHEME, INCLUDING THE  
 PROVISIONS OF (CAL.) P.C. § 1170(b) WHICH AUTHORIZES JUDGES, NOT  
 JURIES TO MAKE FACTUAL FINDINGS SUPPORTING AGGRAVATING FACTORS  
 USED TO IMPOSE THE UPPER TERM. THE SENTENCING JUDGE IN THIS





1 CASE IMPOSED THE UPPER TERM BASED UPON FACTUAL FINDINGS WHICH WERE  
 2 NEITHER ADMITTED BY PETITIONER NOR FOUND TRUE BY A JURY. THE SENTENCING  
 3 JUDGE ALSO WAS NOT REQUIRED UNDER THE CALIFORNIA RULES OF COURT,  
 4 RULE 4.42D (6) TO APPLY THE PROOF BEYOND A REASONABLE DOUBT  
 5 STANDARD TO ITS FACTUAL FINDINGS, AS REQUIRED IN BLAKELY  
 6 (AND FURTHER EXPLAINED IN QUINN-KEENE), BUT RATHER ONLY A  
 7 PREPONDERANCE STANDARD; AND BECAUSE NONE OF THE SENTENCING  
 8 FACTORS IN AGGRAVATION LISTED IN THE PROBATION REPORT OR USED  
 9 BY THE TRIAL JUDGE IN IMPOSING THE SENTENCE WERE TRIED TO  
 10 THE JURY OR PROVED BEYOND A REASONABLE DOUBT, THIS COURT  
 11 SHOULD ORDER THAT THE COURT MAY NOT IMPOSE AN UPPER TERM ON  
 12 EITHER COUNTS OR THE ENHANCEMENT ALLEGATIONS.

13 IN BLAKELY THE UNITED STATES SUPREME COURT HELD  
 14 THAT THE TRIAL COURT'S USE OF AGGRAVATING FACTORS VIOLATE THE  
 15 RULE SET FORTH IN APPENDI V. NEW JERSEY, 530 U.S. 466 (2000),  
 16 WHERE IT HAD HELD THAT (THE) DUE PROCESS (CLAUSE) REQUIRES THAT  
 17 ANY FACT WHICH EXPOSES A DEFENDANT TO GREATER PUNISH-  
 18 -MENT THAN THE MAXIMUM OTHERWISE ALLOWABLE ("STATUTORY  
 19 MAXIMUM") FOR THE UNDERLYING OFFENSE HAD TO BE "SUBMITTED  
 20 TO A JURY AND PROVED BEYOND A REASONABLE DOUBT." (Id.  
 21 AT P. 490).

22 THE "STATUTORY MAXIMUM" FOR APPENDI  
 23 PURPOSES IS THE MAXIMUM SENTENCE A JUDGE MAY IMPOSE SOLELY  
 24 ON THE BASIS OF THE FACTS REFLECTED IN THE JURY VERDICT OR  
 25 ADMITTED BY THE DEFENDANT.

26 "IN ALL MATERIAL RESPECTS, CALIFORNIA'S DETERMINATE  
 27 SENTENCING LAW (D.S.L.) RESEMBLES THE SENTENCING  
 -ING SYSTEMS INVALIDATED IN BLAKELY AND BOOKER.  
 FOLLOWING THE REASONING IN THOSE CASES, THE



MIDDLE TERM PRESCRIBED UNDER CALIFORNIA LAW,  
NOT THE UPPER TERM, IS THE RELEVANT  
STATUTORY MAXIMUM. BECAUSE THE AGGRAVAT-  
-ING FACTS THAT AUTHORIZE THE UPPER TERM  
ARE FOUND BY THE JUDGE, AND NEED ONLY BE  
ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE,  
(CALIFORNIA'S) D.S.L. VIOLATES THE RULE OF APPENDI."

(CUNNINGHAM V. CALIFORNIA (2007) 549 U.S.\_\_\_\_, 127 S.Ct. 856, AT 858 )

WHEREFORE, UNDER APPENDI-BLARELY -  
CUNNINGHAM, THE ONLY FACTORS THE JUDGE IS PERMITTED TO USE TO  
INCREASE A SENTENCE ARE THOSE PRESENTED TO THE JURY FOR ITS  
CONSIDERATION AND FOUND TRUE BY IT BEYOND A REASONABLE DOUBT.  
IF THE JURY DOES NOT FIND UNANIMOUSLY AND BEYOND A REASONABLE  
DOUBT THAT THE AGGRAVATING FACTORS ARE TRUE, THE JUDGE MAY NOT  
USE THEM TO INCREASE A SENTENCE (SEE, ALSO PEOPLE V. BANKS,  
(APR. 13, 2007, 6036873) - CAL. APP. 4TH. (2007 WL 1111849)).

IN THE INSTANT CASE, THE TRIAL COURT  
WAS NOT REQUIRED TO IMPOSE A 12-YEAR, 4-MONTH SENTENCE.  
HENCE, THE TRIAL COURT VIOLATED PETITIONER'S SIXTH AMENDMENT  
RIGHT WHEN IT IMPOSED AN AGGRAVATED SENTENCE BASED  
ON FACTS NOT FOUND BY A JURY TO BE TRUE BEYOND A  
REASONABLE DOUBT OR STIPULATED BY PETITIONER.

PETITIONER WAS PREJUDICED BY THE ERROR.  
USE OF FACTS NOT FOUND BY THE JURY BEYOND A REASONABLE  
DOUBT NOR ADMITTED BY PETITIONER TO INCREASE A  
DEFENDANT'S SENTENCE BEYOND THE STATUTORY MAXIMUM  
REQUIRES REVERSAL OF THAT SENTENCE UNLESS THE STATE  
CAN ESTABLISH THAT THE ERROR WAS HARMLESS BEYOND A  
REASONABLE DOUBT (NEDER V. UNITED STATES (1999) 527

1 U.S. 1 ; PEOPLE V. SENGAPADYCHITH (2001) 26 CAL. 4TH. 316, AT 326)

2 THE ERROR IN THIS CASE WAS THEREFORE,  
3 AN ACTION TAKEN IN EXCESS OF THE TRIAL COURT'S AUTHORITY  
4 WHICH MAY BE CHALLENGED IN HABEAS CORPUS EVEN IF THERE  
5 HAS BEEN DELAY OR A PRIOR AFFIRMANCE ON DIRECT APPEAL.

6 "THE GENERAL RULE THAT AN UNEXPLAINED DELAY IN  
7 SEEKING RELIEF MAY BAR HABEAS CORPUS RELIEF  
8 DOES NOT APPLY TO BAR THE CORRECTION OF AN  
9 UNAUTHORIZED SENTENCE"; AND "AN UNAUTH-  
10 ORIZED SENTENCE MAY BE CORRECTED AT ANY  
11 TIME. THE STATE OF CALIFORNIA SHOULD HAVE NO  
12 INTEREST IN PERPETUATING A SENTENCE  
13 WHICH IS NOT AUTHORIZED BY LAW."

14 (IN RE BIRDWELL (1996) 50 CAL. 4TH. 926, AT 927, & 931 ).

15 IN PEOPLE V. TENORIO (1970) 3 C.3d. 89, AT 95 FN.2,  
16 THE COURT HELD THAT "AN UNCONSTITUTIONAL SENTENCE IS FULLY  
17 RETROACTIVE RELATING ONLY TO SENTENCING AND WOULD NOT REQUIRE  
18 ANY RETRIALS". (SEE, ALSO; PEOPLE V. BELMONTES (1983) 34 CAL.  
19 3d. 335. AT 348 FN.8 (SAME); AND PEOPLE V. SUPERIOR COURT  
20 (NUMERO) (1996) 13 CAL. 4TH. 497. AT 530 FN.13 (HOLDING THAT AN  
21 UNCONSTITUTIONAL SENTENCE MAY BE RAISED ON APPEAL, OR, IF  
22 RELIEF ON APPEAL IS NO LONGER AVAILABLE, THE DEFENDANT  
23 MAY FILE A PETITION FOR HABEAS CORPUS TO SECURE RECONSID-  
24 ERATION OF THE SENTENCE. " ).

25 "AS WE RECENTLY REAFFIRMED, THE RULE REQUIRING  
26 A HABEAS CORPUS PETITIONER TO JUSTIFY ANY  
27 SUBSTANTIAL DELAY IN RAISING A CLAIM, SUCH  
28 AS PETITIONERS, OF "SENTENCING ERROR  
29 AMOUNTING TO AN EXCESS OF JURISDICTION. AN  
30 APPELLATE COURT MAY CORRECT A SENTENCE THAT  
31 IS NOT AUTHORIZED BY LAW" WHENEVER THE  
32 ERROR COMES TO THE ATTENTION OF THE COURT  
33 ( IN RE HARRIS (1993) 5 CAL. 4TH. 813, 842 CITING  
34 IN RE RICKY H. (1981) 30 CAL. 3d. 176, 191 )."

35 (IN RE HODDINOTT (1996) 12 CAL. 4TH. 992. AT 995 FN. 2. )



II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S WRIT OF HABEAS CORPUS HEREOFORTH WAS IN ERROR, AND APPROPRIATE REMEDY FOR TRIAL COURT'S APPENDI - BLAKELY - CUNNINGHAM SENTENCING ERROR IS TO REMAND PETITIONER'S CASE FOR RESENTENCING; APPENDI V. NEW JERSEY (2000) 530 U.S. 466; BLAKELY V. WASHINGTON (2004) 542 U.S. 296; U.S. V. OLAND (1993) 507 U.S. 725; AND PEOPLE V. BANKS (APR. 13, 2007, 6036873) CAL. APP. 4TH. (2007 WL1111849).

STATEMENT OF FACTS

ON APRIL 25, 2007 THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN, IN CASE NO. SC152826A, DENIED PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (HEREFORTH) BASED IN AN ERRONEOUS CONCLUSION THAT BECAUSE "PETITIONER EXECUTED A CHANGE OF PLEA FORM WHICH AMONG OTHER THINGS CONTAINED A WAIVER OF THE RIGHT TO A JURY TRIAL AS WELL AS AN AGREEMENT BY PETITIONER THAT HIS MAXIMUM SENTENCE EXPOSURE WAS IN FACT 12-YEARS AND 4-MONTHS. THE SENTENCE OF 12-YEARS WAS THEREFORE WITHIN THE PARAMETERS OF THE MAXIMUM SENTENCE TO WHICH PETITIONER AGREED" (PLEASE SEE COURT DENIAL ATTACHED HERETO AS EXHIBIT 'A').

CONCLUSION OF LAW

IN BOTH APPENDI AND BLAKELY, BOTH DEFENDANTS PLEAD GUILTY TO PLEA BARGAIN AGREEMENTS, HOWEVER, BECAUSE THE FACTS SUPPORTING THEIR AGGRAVATED (UPPER TERM) SENTENCES WERE NEITHER ADMITTED BY THEM NOR FOUND BY A JURY BEYOND A REASONABLE DOUBT TO BE TRUE, THE SENTENCES VIOLATED THEIR SIXTH AMENDMENT RIGHT TO TRIAL BY JURY.

FURTHERMORE, THE TRIAL COURT ALSO ALLEGES IN ITS



1 APRIL 25, 2007 DENIAL (ATTACHED HEREIN AS EXHIBIT 'A') THAT  
 2 HE FORFEITED (WAIVED) HIS RIGHT UNDER APPENDI - BLAKELY -  
 3 CUNNINGHAM IS ALSO IN ERROR.

4 PETITIONER'S SENTENCE HEARING TOOK PLACE ON MARCH  
 5 19, 2003, APPROXIMATELY 15-MONTHS PRIOR TO THE U.S. SUPREME  
 6 COURT'S DECISION IN BLAKELY. WHEREFORE, THE TRIAL COURT'S  
 7 IMPLICATION THAT PETITIONER KNOWINGLY WAIVED OR FORFEITED HIS  
 8 BLAKELY CHALLENGE / ERROR; IS IMPOSSIBLE CONSIDERING THAT  
 9 BLAKELY (AND CUNNINGHAM) WERE DECIDED AFTER PETITIONER  
 10 WAS SENTENCED.

11 "WE FIND THERE IS NO WAIVER OR FORFEITURE  
 12 OF BLAKELY ERROR IN THIS CASE BECAUSE  
 13 A CRIMINAL DEFENDANT CAN NOT HAVE  
 14 FORFEITED OR WAIVED A LEGAL ARGUMENT  
 15 THAT WAS NOT RECOGNIZED AT THE TIME OF HIS  
 16 TRIAL."

17 (PEOPLE V. ESQUIBEL (2006) 143 CAL. APP. 4TH 645, AT 660)

18 SEE, ALSO, U.S. V. OLAND, 507 U.S. 725, AT 733

19 ("WAIVER IS THE INTENTIONAL RELINQUISHMENT OR ABANDONMENT OF A  
 20 KNOWN RIGHT.").

21 IT WAS NOT UNTILL BLAKELY THAT THE  
 22 U.S. SUPREME COURT PROVIDED A CONSTITUTIONAL EXPLANATION OF  
 23 WHAT IT HAD MEANT IN APPENDI BY THE PHRASE "STATUTORY  
 24 MAXIMUM SENTENCE". THUS SO, BLAKELY MADE IT PERFECTLY  
 25 CLEAR THAT, WHEN THE U.S. SUPREME COURT REFERRED TO THE  
 26 "STATUTORY MAXIMUM SENTENCE" IN APPENDI, IT DID  
 27 NOT MEAN THE MAXIMUM THE LEGISLATURE HAD AUTHORIZED, BUT  
 RATHER THE MAXIMUM SENTENCE THAT CAN BE IMPOSED, BASED  
 SOLELY ON THE JURY'S FINDINGS OR ADMITTED BY THE DEFENDANT

1 (BLAKELY, SUPRA, 542 U.S. AT 296).

2 APPLYING THIS DEFINITION, A HIGH-END  
3 SENTENCE, SUCH AS PETITIONERS, BASED ON FACTS FOUND BY THE JUDGE  
4 ALONE DOES EXCEED THE "STATUTORY MAXIMUM", BECAUSE THE MID-TERM  
5 SENTENCE IS THE MOST THAT CAN BE IMPOSED WITH OUT SPECIAL FINDINGS  
6

7  
8 CONCLUSION

9 FOR THE FOREGOING REASON HEREIN, THIS COURT  
10 SHOULD REMAND THIS CASE TO THE TRIAL COURT FOR RE SENTENCING OF  
11 PETITIONERS SENTENCE TO THE MIDDLE TERM PURSUANT TO THE MANDATES OF THE  
12 UNITED STATES SUPREME COURT DECISIONS OF APPENDI-BLAKELY-CUNNINGHAM  
13 AND CONSISTENT WITH THIS COURTS RULING IN PEOPLE V. BANKS (APR.13,2007;  
14 6036873) — CAL. APP. 4TH — (2007 WL 1111849).

15  
16  
17 DATED: 7-29-07

RESPECTFULLY SUBMITTED BY:

18 Alejandro F. Michel  
19 ALEJANDRO F. MICHEL

20 -PRO-PER PETITIONER.  
21  
22  
23  
24  
25  
26  
27

**Exhibit**



FILED

APR 25 2007

KIM TURNER  
Court Executive Officer  
MARIN COUNTY SUPERIOR COURT  
By: [Signature] Deputy

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MARIN

In re ALEJANDRO FRANCISCO MICHEL )

Case No. SC 152826A

Petitioner, )

**ORDER DENYING PETITION FOR  
WRIT OF HABEAS CORPUS**

Petitioner filed his Petition for Writ of Habeas Corpus on April 4, 2007. Following a plea of guilty to five counts of violating Penal Code §211 and two counts of attempted §211, Petitioner was sentenced on March 19, 2003 in the Superior Court in Marin County to the aggravated term of twelve years in the state prison.

Petitioner now complains pursuant to what is known as a *Blakely/Apprendi/Cunningham* argument that he was improperly sentenced to the aggravated term because factors in aggravation were not found to be true by a jury.

Petitioner appealed his sentence and the sentence was affirmed by the Court of Appeal on April 28, 2004. In reviewing the record, it appears that Petitioner executed a change of plea form which among other things contained a waiver of the right to a jury trial as well as an agreement by Petitioner that his maximum exposure was in fact twelve years and four months. The sentence of twelve years was therefore within the parameters of the maximum sentence to which Petitioner agreed.

The Petition for Writ of Habeas Corpus is therefore denied.

Dated: April 25, 2007

[Signature]  
JUDGE OF THE SUPERIOR COURT



STATE OF CALIFORNIA )  
COUNTY OF MARIN )

IN RE: ALEJANDRO FRANCISCO MICHEL

ACTION NO.: SC152826A

(PROOF OF SERVICE BY MAIL – 1013A, 2015.5 C.C.P.)

I AM AN EMPLOYEE OF THE SUPERIOR COURT OF MARIN; I AM OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE WITHIN ABOVE-ENTITLED ACTION; MY BUSINESS ADDRESS IS CIVIC CENTER, HALL OF JUSTICE, SAN RAFAEL, CA 94903. ON April 25, 2007 I SERVED THE WITHIN **ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS** IN SAID ACTION TO ALL INTERESTED PARTIES, BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN THE UNITED STATES POST OFFICE MAIL BOX AT SAN RAFAEL, CA ADDRESSED AS FOLLOWS:

<b>ALEJANDRO FRANCISCO MICHEL</b> <b>CDC# T-86169</b> <b>CALIFORNIA CORRECTIONAL</b> <b>INSTITUTION</b> <b>PO BOX 1906/48-8C-204</b> <b>TEHACHAPI, CA 93581</b>	<b>WARDEN</b> <b>CALIFORNIA CORRECTIONAL</b> <b>INSTITUTION</b> <b>PO BOX 1906</b> <b>TEHACHAPI, CA 93581</b>
<b>ATTORNEY GENERAL</b> <b>ATTN: ANYA BINSACCA</b> <b>CORRECTIONAL LAW SECTION</b> <b>455 GOLDEN GATE AVENUE</b> <b>12TH FLOOR</b> <b>SAN FRANCISCO, CA 94102</b>	

I CERTIFY (OR DECLARE), UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING IS TRUE AND CORRECT.

DATE:

4/25/07

*MMunphy*



# **Exhibit**

# **B**

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

In re ALEJANDRO FRANCISCO MICHEL on Habeas  
Corpus.

A118214

Marin County No. 123016

FILED

JUL 13 2007

Court of Appeal - First App. Dist.

DIANA HERBERT

By

DEPUTY

BY THE COURT:\*

The petition for writ of habeas corpus is denied.

Date JUL 13 2007

JONES, P.J. P.J.

\* Before Jones, P.J., Simons, J. and Needham, J.

FORM E

Proof of Service by Mail

[Case Name and Court Number]

I declare that:

I am a resident of C.C.I. PRISON in the county of KERN,

California. I am over the age of 18 years. My residence address is:

P.O. BOX: 1906, TEHACHAPI, CA. 93581

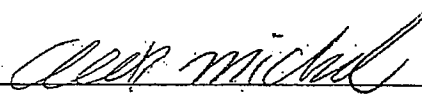
On 7-29-07, I served the attached PETITION FOR WRIT OF HABEAS on the  
RESPONDENT in said case by placing a true copy thereof enclosed in a sealed  
envelope with postage thereon fully paid, in the United States mail at C.C.I. PRISON  
addressed as follows:

ATTORNEY GENERAL OFFICE

455 GOLDEN GATE AVE, 12TH FL., SAN FRANCISCO, CA. 94102

I declare under penalty of perjury under the laws of the State of California that the  
foregoing is true and correct, and that this declaration was executed on 7-29-07 [date],  
at TEHACHAPI, California.

ALEJANDRO F. MICHEL  
[Type or Print Name]

  
[Signature]

**DECLARATION OF SERVICE BY MAIL**

Case Name: *Alejandro Michel v. Walker*

Case No. **C 08-1724 JSW**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 12, 2008, I served the attached

**MOTION TO DISMISS HABEAS CORPUS PETITION AS UNTIMELY**

in the internal mail collection system at the Office of the Attorney General, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

Alejandro Michel  
T-86169  
California State Prison - Sacramento  
P.O. Box 290066  
Represa, CA 95671

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on June 12, 2008, at San Francisco, California.

\_\_\_\_\_  
Denise Neves

\_\_\_\_\_  
/s/ Denise Neves

Signature